STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

FILED

NOV 25 2002

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE PETITION OF INDIANA BELL TELEPHONE COMPANY, INCORPORATED, D/B/A AMERITECH INDIANA PURSUANT TO I.C. 8-1-2-61 FOR A THREE-PHASE PROCESS FOR COMMISSION REVIEW OF VARIOUS SUBMISSIONS OF AMERITECH INDIANA TO SHOW COMPLIANCE WITH SECTION 271(c) OF THE TELECOMMUNICATIONS ACT OF 1996	}	CAUSE NO. 41657

AMERITECH INDIANA'S REPLY IN SUPPORT OF ITS PETITION FOR RECONSIDERATION OF ORDER ADOPTING PERFORMANCE ASSURANCE AND REMEDY PLAN

The Commission's October 16, 2002 Order herein directed Ameritech Indiana to implement the IURC Remedy Plan. That Plan imposes costly performance testing, reporting and auditing requirements on Ameritech Indiana to evaluate its compliance with obligations to CLECs under § 251 of the Federal Telecommunications Act of 1996. It also requires Payments to CLECs and the State if Ameritech Indiana's performance, as measured by the IURC Plan's statistical and mathematical methodology, falls short of the Plan's performance standards.

Ameritech Indiana's November 6 Petition for Reconsideration, accompanied by the Affidavit of James D. Ehr, respectfully urges the Commission to reconsider and vacate the Order. The Petition raises two serious legal problems with the Order that, if not corrected on reconsideration, will need to be resolved in judicial review proceedings entailing significant additional time and expense for the Commission as well as Ameritech Indiana.[1]

---

[1] Ameritech Indiana also filed a Petition to Modify the Order simply by staying its effective date

The first legal problem is that the Commission lacked statutory authority to direct Ameritech Indiana to implement the IURC Remedy Plan, including its required Payments to CLECs and the State. The second legal problem is that the Order unlawfully circumvents the "interconnection agreement" procedures established by § 252 of the Federal Act.

The November 18 Response of AT&T Communications of Indiana, Inc., TCG Indianapolis, WorldCom, Inc. and McLeod USA ("Indiana CLECs") relies heavily on "argument by adjective" – saying, *e.g.*, that the Petition and Ehr Affidavit are "ludicrous," "ridiculous" and (at one point) "particularly ludicrious [*sic*]." Response at 2, 3, 6. The Response is accompanied by an Affidavit of Karen W. Moore ("Moore Aff."), which (as shown below) is inaccurate and off-point. The Response also advances various procedural assertions that (as also shown below) reveal that the Indiana CLECs ignored what the Petition and Commission rules actually say.

Most important, the Indiana CLECs simply ignore the very purpose of this proceeding, which sets the critical context for evaluating the Order and the legal flaws identified by the Petition. The reason this cause was initiated is Ameritech Indiana's planned application to the FCC under § 271 of the Act for authorization to provide interLATA telecommunications service (in common parlance, "long distance service") originating in Indiana. The purpose of this IURC proceeding is the nonbinding recommendation the Act contemplates the Commission will make to the FCC on that § 271 Application. The precise purposes of the "remedy plans" Ameritech Indiana has proposed, and the nature and extent of the Commission's statutory authority to enter any "remedy plan" order, are defined and limited by that § 271 Application process and the Commission's role in this aspect of the Act's Federal regulatory regime.

Specifically, a remedy plan in the context of a § 271 Application by a former Bell Operating Company is simply a mechanism to evaluate ongoing BOC compliance with § 251 obligations for purposes of a State commission recommendation on that Application and (ultimately) the FCC decision thereon. Remedy plans can provide assurance on continued § 251 compliance, *after* long distance authority is granted, for purposes of the State recommendation and FCC decision. That is why BOCs have proposed such plans, State commissions have approved them, and the FCC has credited them in deciding § 271 Applications. In effect, a § 271 applicant proposing a remedy plan with Payment provisions is agreeing to (a) have its future compliance with § 251 obligations measured in certain ways, and (b) make Payments to CLECs and the State when its compliance (as so measured) falls short – with both agreements being made to provide post-long distance authority assurance to the State commission and the FCC on the § 251 aspects of their recommendation and decision, respectively, on the § 271 Application.

But nothing in § 271 *requires* that a long distance applicant propose or agree to a particular remedy plan (or any remedy plan at all) as part of a § 271 Application. Likewise, nothing in § 271 authorizes the FCC or a State commission to *order* a long distance applicant to implement a particular remedy plan with which the applicant does not agree. To be sure, a State commission or the FCC may take the position that it will not recommend or approve, respectively, a § 271 Application unless a BOC agrees to implement a remedy plan with particular Payment and other provisions. Whether taking such a position is legally authorized in a given case is not now presented here. But on the issue that *is* presented, the answer is clear. Neither the State nor Federal regulatory body has statutory power under § 271 to *compel* a long distance applicant to implement a remedy plan (including Payment provisions) that *compels* the

BOC to do things it has not agreed to do for purposes of its long distance application – just as nothing in § 271 or elsewhere in the Act *compels* (or authorizes a State commission or the FCC to compel) a BOC either to make or continue to pursue any § 271 Application in the first place.

The initial, central legal flaw of the Order is that it *does* compel Ameritech Indiana to implement the IURC Remedy Plan, which *does* compel Ameritech Indiana to do things (including make Payments) it has not agreed to do for purposes of its § 271 Application. As shown in the Petition for Reconsideration, the Commission has no Indiana statutory authority to do this, particularly when (as the Petition and Ehr Affidavit show) the Payments constitute penalties. The Indiana CLECs make no credible response to the Indiana law summarized in the Petition, but assert that such authority is somehow conferred by Federal law under § 271. As explained above and further demonstrated below, § 271 confers no such authority.

The Order's other critical legal failing is that the IURC Remedy Plan it compels Ameritech Indiana to implement is made "available to CLECs as a stand-alone document, independent of the Section 251/252 interconnection agreement process." IURC Plan § 2.1 at 6. As shown in the Petition, this circumvents and conflicts with, and is therefore preempted by, the Federal Act. On this point, the Indiana CLECs make no credible response to the Federal law summarized in the Petition, but now assert that the Commission derived the authority exercised in the Order from *State law* supposedly preserved from preemption under § 261 of the Act. This assertion is doubly wrong on its own terms, because (a) Indiana law confers no authority on the Commission to award damages (prospectively or otherwise), much less to impose civil penalties; and (b) § 261 of the Act protects from preemption only those State requirements that "are not inconsistent" with Federal requirements. It is also an astonishing "about face" from the Indiana CLECs' earlier position in the same Response that the Commission's authority to compel the IURC Remedy Plan supposedly does *not* derive from State law, but rather from § 271 of the Act.

These are serious legal issues. Due to the substantial implementation and compliance costs imposed by the IURC Remedy Plan, as well as the penalties authorized by its Payment provisions, Ameritech Indiana has preserved its rights to judicial review of the preemption and other Federal law issues by filing its complaint for appropriate declaratory and other relief in *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, Case No. 1:02-CV-1772-LJM (S.D. Ind.). It has also preserved its rights to judicial review of the State law issues by its subsequent Notice of Appeal to the Court of Appeals of Indiana (Cause No. 93A02-0211-EX-950). Ameritech Indiana will need to pursue such judicial review if its efforts to have these legal flaws addressed and corrected by the Commission are unavailing.

Ameritech Indiana sincerely hopes, however, that these problems will be corrected by the Commission, thereby eliminating additional delay and expense for all concerned – and also yielding a remedy plan that will further the objectives the Commission intended to advance. That is why Ameritech Indiana filed its Petition for Reconsideration, which it was not required to do to preserve its judicial review rights. That is also why Ameritech Indiana respectfully reiterates in this Reply its serious request that the Commission reconsider and vacate its Order in light of the pertinent and governing legal principles and authorities, and adopt instead either the Original Ameritech Plan or the Ameritech Compromise Plan.

REPLY TO INDIANA CLECS' AFFIDAVIT

The Ehr Affidavit documented in detail that the IURC Remedy Plan imposes costly and burdensome requirements on Ameritech Indiana. It also documented in detail the reasons the Payment provisions of the IURC Plan would impose penalties on Ameritech Indiana. These reasons include that the IURC Methodology – which differs materially from the Ameritech Methodology in remedy plans in multiple other § 271 Applications approved by the FCC – will require Payments in circumstances where supposed noncompliance with performance measures is due to random variation rather than actual noncompliance by Ameritech Indiana. Another reason is that the IURC Plan doubles, without evidentiary basis or explanation, the "base amounts" used to calculate "per occurrence" Payments.

Nothing in the Moore Affidavit accompanying the Indiana CLECs' Response refutes any of these points established by the Ehr Affidavit. Much of the Moore Affidavit does not even involve "facts," but rather recites Ms. Moore's legal opinions and conclusions, and indulges in the same "argument by adjective" that characterizes the Response. *See, e.g.*, Moore Aff. ¶ 26 (stating that "*I think*" the Commission's action "*does not justify rehearing*"); *id.* ¶ 29 (calling Ameritech Indiana's positions "sour grapes").[2]

To the extent the Moore Affidavit does purport to address factual points established by the Ehr Affidavit, it consistently misstates pertinent facts and misunderstands the pertinent issues. These repeated failings are carefully and thoroughly demonstrated and documented in the Supplemental Affidavit of James D. Ehr that accompanies this Reply, which Ameritech Indiana

---

[2]Unless otherwise indicated, all quotation emphasis has been added.

urges that the Commission carefully review. Doing so shows that (a) none of the Moore Affidavit's purported refutations of the initial Ehr Affidavit withstands scrutiny; and (b) denial of reconsideration based on the Moore Affidavit's assertions could not withstand judicial review.

REPLY TO INDIANA CLECS' PROCEDURAL ASSERTIONS

The Indiana CLECs also attack the Petition for Reconsideration on procedural grounds, asserting that it "fails to meet *any* of the[] standards" of 170 IAC 1-1.1-22(e). Response at 4 (original emphasis). This ignores the distinction between a petition for "reconsideration" and a petition for "rehearing" – a distinction that is evident on the face of this Commission rule.

Subparts (A) through (D) of 170 IAC 1-1.1-22(e)(1) do set forth the four requirements on new "evidence" that the Response quotes. The Indiana CLECs omit, however, that the Commission rule explicitly prefaces those "evidence" requirements with this statement: "***If** the petition seeks **rehearing***, it shall be verified or supported by affidavit and shall set forth the following . . . ." Ameritech Indiana's Petition does not seek "rehearing." It is titled "Petition for Reconsideration"; and "reconsideration" is what it seeks, based on *legal* error in the Order. Hence, the Commission rules required only that the Petition "be concise, stating the specific grounds relied upon, with appropriate record references and specific requests for the findings or orders desired." 170 IAC 1-1.1-22(e)(1). Ameritech Indiana's Petition straightforwardly complies with those requirements, and the Indiana CLECs cannot and do not contend otherwise.[3]

---

[3]The distinction between petitions for reconsideration and for rehearing is also shown by 170 IAC 1-1.1-22(e)(4), which states: "A petition for reconsideration shall be *deemed* a petition for rehearing *for purposes of IC 8-1-3-2*." This references the statutory section on requests for Commission re-examination its orders, which uses only the term "rehearing," and ensures that petitions for "reconsideration" are accorded the same effect under the statute.

Moreover, even if the Petition had been titled as being for "rehearing" rather than for reconsideration, the Response's assertion of supposed "noncompliance" with the Commission's rule is meritless. The Indiana CLECs apparently believe the Petition must reiterate the language of the rule rather than simply comply with it. This is wrong. Nothing in the Commission's rules require a petition to recite subparts (A) through (D) of 170 IAC 1-1.1-22(e)(1) verbatim. Furthermore, the Petition's compliance with even these elements of the rule is obvious. It is concise and supported by an affidavit. These documents explain the nature and purposes of the matters to considered on rehearing, as well as how such matters would affect the outcome of the proceeding. Finally, since the IURC Remedy Plan was not circulated for comment prior to its adoption, the matters set forth in the Petition and Ehr Affidavit could not have been addressed prior to the entry of the Order, and therefore are not merely cumulative.

In addition to their misstatement of the Commission's rules, the Indiana CLECs make two other mischaracterizations on procedural matters related to Ameritech Indiana's Petition.

First, they assert that a "telling indicator of the merits" of the Petition is Ameritech Indiana's November 15 Notice of Appeal, which supposedly shows it "is not even bothering to wait for a decision on rehearing [*sic*] to appeal" and is "hardly a sign of confidence in the merits of Ameritech's rehearing [*sic*] request." Response at 4. This ignores the reason under our current Appellate Rules that Ameritech Indiana was required to file a Notice of Appeal by November 15 to preserve its right to judicial review in the Indiana Court of Appeals – a reason Ameritech Indiana was careful to state in the Petition. To repeat:

> Although IND. CODE § 8-1-3-2(b) extends the time to appeal an IURC order to 30 days after Commission decision on a petition for reconsideration, the Indiana

> Appellate Rules now provide that an appeal "from an order, ruling or decision of an Administrative Agency is commenced by filing a Notice of Appeal within thirty (30) days after the date of the order, ruling or decision, *notwithstanding any statute to the contrary*." IND. APPELLATE RULE 9(A)(2) (emphasis added). Hence, Ameritech Indiana will file a Notice of Appeal within the time prescribed by APP. R. 9(A)(2) to preserve its right to appeal to the Indiana Court of Appeals. A final Commission decision thereafter to vacate the Order can, however, effectively be implemented notwithstanding commencement of that appeal, which could then be dismissed as moot.

Petition at 2 n.1. Hence, the supposedly "telling indicator" the Indiana CLECs strain to extract from filing of the Notice of Appeal is mythical.

Second, the Indiana CLECs assert that Ameritech's separate Petition to Modify the Order (by staying its effective date pending Commission ruling on the Petition for Reconsideration) "does not even bother to attempt to show the company meets the standards under Indiana law to obtain a stay." Response at 23. The Indiana CLECs then cite *Rees v. Panhandle Eastern Pipe Line Co.*, 176 Ind. App. 597, 377 N.E.2d 640 (1978), as supposedly establishing that these standards are "quite explicit," and include "reasonable likelihood of success on the merits of the appeal" and irreparable harm and public interest factors involving a "stay." Response at 23.

This is misleading from start to finish. *Rees* was not a "stay" case, much less one involving the standards for a "stay" pending "appeal." It was an interlocutory appeal of a trial court preliminary injunction involving easement rights. The "standards" the Response recites – using the words "appeal" and "stay," and put in a format suggesting these are quotations from or (at the least) paraphrases of *Rees* – in fact involve requirements for preliminary injunctive relief.

Moreover, the Indiana CLECs ignore that Ameritech Indiana has *not* filed a motion asking the Commission to stay the order "pending appeal" – a point the Petition for Reconsideration again expressly noted:

> The Commission's granting of the separate Petition to Modify the Order by staying its implementation pending the ruling on this Petition for Reconsideration would also eliminate the need to commence proceedings consistent with APP. R. 39 for a stay pending appeal (unless and until any Commission ruling is entered denying this Petition for Reconsideration).

Petition at 2 n.1. The Petition to Modify was instead based on the Commission authority to modify any of its orders under IND. CODE § 8-1-2-72. The Indiana CLECs point to no law (and Ameritech Indiana is aware of none) that confines this authority to alter the effective date or other aspects of a Commission order to circumstances that warrant a stay pending appeal (much less to those that warrant a preliminary injunction).[4]

The Commission certainly can exercise its modification authority to defer the effective date of the Order while it considers serious legal issues as to its power to issue that Order in the first place – issues that, if reconsideration is not granted, will have to be resolved in judicial review proceedings. Furthermore, delaying the Order's effective date pending ruling on the Petition for Reconsideration is particularly appropriate since (as shown below) the FCC, in approving other § 271 Applications that included "remedy plans," has made clear that such plans are to take effect *after* approval of the Application, not in the midst of the Application process.

---

[4]As the Notice of Appeal is now on file, Ameritech Indiana may initiate proceedings consistent with APP. R. 39 for a stay pending appeal by first seeking such a stay from the Commission. If and when it does, Ameritech Indiana will address the actual standards governing such stays and show how these are satisfied. But again, delaying the effective date of the Order pending the ruling on the Petition for Reconsideration, as requested in the separate Petition to Modify, will eliminate the need for APP. R. 39 stay proceedings unless and until reconsideration is denied.

REPLY TO INDIANA CLECS' LEGAL ARGUMENTS

I. The Commission Has No Authority Under Either State Or Federal Law To Compel Ameritech Indiana To Implement The IURC Remedy Plan.

The Petition for Reconsideration gathered Indiana law showing that the Commission had no authority under any statute – including those cited in the Order – to require Ameritech Indiana to implement the IURC Remedy Plan and its Payment provisions. The Response does not even discuss, much less attempt to refute, any of this established Indiana law.

Instead, the Response asserts that Commission power to impose the IURC Plan derives not from Indiana law, but from § 271 of the Act. This is so, say the Indiana CLECs, because:

> "state commissions have an essential role" in the § 271 process, Response at 14;
>
> the FCC has said it "'may give evidence submitted by the state commission substantial weight'" in that process "'where the state has conducted an exhaustive an rigorous investigation into the BOC's compliance'" with the § 271 competitive checklist involving § 251 obligations to CLECs, *id.*, quoting *In re Application of Bell Atlantic New York . . . To Provide In-Region, InterLATA Services in New York*, 15 FCC Rcd. 3953, ¶ 51 (Dec. 22, 1999);
>
> the FCC has also said that "'existence of a satisfactory performance and monitoring plan is probative evidence that the BOC will continue to meet its 271 obligations after a grant of such authority,'" Response at 14, quoting *In re Joint Application of BellSouth Corp., et al. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, 17 FCC Rcd. 9018, ¶ 291 (May 15, 2002) ("*BellSouth Georgia-Louisiana Order*"); and
>
> "*every* state utility commission in other states for which Section 271 authority has been granted for a Bell company have [*sic*] established a remedy plan for the particular Bell Operating Company," Response at 15 (original emphasis).

All these observations on the roles of State utility commissions and remedy plans in the § 271 process entirely miss the pertinent point about the Commission's lack of authority to enter the Order compelling implementation of the IURC Remedy Plan. The issue here is *not* whether a State commission may approve, and the FCC may credit, a remedy plan with Payment and other provisions that a BOC has proposed (or to which it decides not to object) as part of its own § 271 Application. The issue instead is whether a State commission may *compel* a BOC who has made a § 271 Application to implement a remedy plan with Payment and other provisions that the BOC has *not* proposed and to which it *does* object.

The answer to that dispositive question is "No." The Indiana law carefully set forth in Ameritech Indiana's Petition (which the Indiana CLECs simply ignore) shows that no Indiana statute confers any such authority on the Commission. The same is true of the Federal law to which the Indiana CLECs now point in their Response. *Nothing* in § 271 authorizes a State utility commission (or for that matter, the FCC) to order payment of damages or penalties to CLECs or a State for a BOC long distance applicant's noncompliance with § 251 obligations *when the BOC has not agreed to do so.* Nor has the FCC even asserted that any such authority exists (either for State commissions or itself) in the § 271 proceedings cited in the Response.

Rather, these and other § 271 proceedings have involved remedy plans that were agreed to the BOC as part of its long distance application, typically involving a plan proposed by the BOC itself which may then have been modified in the course of State commission or FCC consideration in ways the BOC was willing to accept. But none of these FCC proceedings involved a State commission or the FCC *requiring* the BOC to implement a remedy plan with Payment or other provisions the BOC was *not* willing to accept as part of its § 271 Application.

The fact that remedy plans acceptable to the BOC are included in State commission and FCC "orders" on the § 271 Application does not mean that a State commission or the FCC may therefore "order" implementation of a remedy plan with Payment and other provisions that are *not* acceptable to the BOC. Authority to approve something a party has agreed to do neither implies nor creates authority to compel the party to do something it has not agreed to do. This is easily illustrated by two simple examples.

One of these is consent decrees, by which a court approves and adopts as a "court order" an agreement negotiated by the parties. There is no question courts have power to approve such decrees and that, once entered, they have the same authoritative effect as any other court order. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992) (consent decree "embodies an agreement of the parties" that they "desire and expect will be reflected in, and be enforceable as, a judicial decree"). But a consent decree can obviously include matters a court would have no authority to "order" absent the parties' agreement. For example, it may include agreed "specific performance" obligations in situations where a court's contract enforcement power would authorize it only to award damages. Likewise, a court's authority to enter an "order" approving what the parties have agreed to does not give it authority to "order" something materially different to which either party does *not* agree. *See, e.g., United States v. Colorado*, 937 F.2d 505, 509-10 (10th Cir. 1991) (reversing order that "discarded the balance struck by the parties concerning the duration and procedures for dismissing the consent decree and substituted its own procedures and time frame"; rather, "district court should have either approved or denied the consent decree as a whole when presented with the terms by the parties").

The other example comes directly from telecommunications law. The FCC order approving the SBC-Ameritech merger incorporated numerous voluntary commitments by the merging parties. These included, *e.g.*, agreements to make contributions of up to $39.6 million per market and $1.188 billion overall in the event certain requirements were not satisfied. Appendix C to SBC-Ameritech Merger Application ¶ 59(d), approved in *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act . . .*, 14 FCC Rcd. 14712 (Oct. 8, 1999). No one questions these commitments are part of the "order" approving the merger. But it is equally clear the FCC had no authority to "order" the merging parties to do undertake this or any other such voluntary commitment absent their agreement to do so. *See id.* ¶ 1 ("conditions represent[] a set of voluntary commitments"); 14 FCC Rcd. at 15174 *et seq.* (statement of Comm'r Furchtgott-Roth, concurring in part and dissenting in part).[5]

The same is true of remedy plans with Payment provisions in § 271 Applications. A BOC may agree to such a plan to promote State commission and FCC confidence, for purposes of their respective recommendation and decision on the Application, as to continued § 251 compliance if the Application is approved. But nothing in § 271 either (a) *requires* that a BOC propose or agree to any remedy plan as part of a § 271 Application; or (b) authorizes the FCC or a State commission to *order* a BOC to implement a remedy plan with which the BOC does not agree. A State commission or the FCC may of course decide that it will not recommend or

[5]Similarly, the Opportunity Indiana 2000 Settlement Agreement approved by this Commission includes service quality performance penalties and enforcement penalties that the Commission has no statutory authority to order absent the parties' Agreement. *See In re Petition of Indiana Bell Tel. Co.*, Cause Nos. 40785-S1, 40849 & 41058, at 7-8 (IURC May 24, 2002).

approve, respectively, a § 271 Application unless a BOC agrees to implement a particular remedy plan. Whether such a decision would be legally authorized is a separate issue not now presented. But on the issue that *is* presented – namely, whether the Commission has statutory authority to *compel* Ameritech Indiana to implement the IURC Remedy Plan – the answer is "No" under both Indiana and Federal law.

The negative answer under Federal law is underscored by the fact that the Order here directs Ameritech Indiana to implement the IURC Plan *now*, in advance of FCC approval of its § 271 Application. FCC orders approving § 271 Applications with remedy plans make clear that the very purpose of such plans is to create incentive for ongoing compliance with § 271 obligations (including 251 obligations to CLECs) *after* a BOC's entry into the long distance market. This is shown by the Indiana CLECs own quotations from such FCC orders. *See BellSouth Georgia-Louisiana Order* ¶ 291 ("existence of a satisfactory performance and monitoring plan is probative evidence that the BOC will *continue* to meet its 271 obligations *after* a grant of such authority"), quoted in Response at 14.[6]

Hence, the remedy plans in these proceedings were implemented *after* the BOC received FCC approval to enter the long distance market. No BOC was required to implement a

---

[6]*See also BellSouth Georgia-Louisiana Order* ¶ 2 (remedy plan is "designed to create a financial incentive for *post-entry* compliance"); *In re Application by Verizon New England Inc., et al. . . . to Provide In-Region, InterLATA Services in Rhode Island*, 17 FCC Rcd. 3308, ¶ 3 (Feb. 22, 2002) (same); *In re Joint Application of SBC Communications Inc., et al. for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd. 6237, ¶ 3 (Jan. 22, 2002) (same); *In re Application by Verizon Pennsylvania Inc., et al. . . . to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd. 17419, ¶ 3 (Sept. 19, 2001) (same); *In re Application by Verizon New York Inc., et al. . . . to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd. 14147, ¶ 3 (July 20, 2001) (same).

remedy plan *in advance* of FCC approval of a § 271 Application, as the Order here directs Ameritech Indiana to do. Indeed, CLEC efforts to require a BOC to implement a remedy plan prior to such FCC approval have been expressly rejected, precisely because the purpose of such plans is to ensure a BOC's compliance with its obligations *after* it has been granted entry into the long distance market.[7]

Finally, none of this is altered by the Indiana CLECs' arguments (see Response at 16-17) that the IURC Remedy Plan incorporates features that were proposed by Ameritech Indiana. A BOC does not, by proposing a remedy plan that necessarily incorporates a variety of interrelated performance measures and Payment provisions, thereby "agree" or "consent" to a State commission's ordering implementation of a materially different plan that happens to select particular parts of the BOC proposal. To use the most obvious example, the IURC Plan doubles – without any evidentiary basis – the "base amounts" proposed by Ameritech Indiana for calculating per-occurrence Tier 1 Payments to CLECs. This by itself makes the IURC Plan substantially more penal and onerous than anything Ameritech Indiana was willing to implement as part of its § 271 Application (even aside from the IURC Plan's other material alterations in the methodology for assessing Ameritech Indiana's performance). The fact that portions of the

[7] *See In re Petition of New York Tel. Co. for Approval of Its Statement of Generally Available Terms and Conditions Pursuant to § 252 of the Telecomm. Act of 1996 and Draft Filing of Petition for InterLATA Entry Pursuant to § 271 of the Telecomm. Act of 1996* and *In re Petition of Bell Atlantic-New York for Approval of Performance Assurance Plan and Change Control Assurance Plan*, Order Adopting Amended Performance Assurance Plan and Amended Change Control Plan at 10-11, Case Nos. 99-C-0271 & 99-C-0949 (N.Y. Pub. Serv. Comm'n Nov. 3, 1999) (CLEC contention that remedy plan "should be fully-operational and effective immediately after the order approving the plan is issued to assure that the market is irreversibly open prior to obtaining Section 271 authority" is "not appropriate," because plan is a "mechanism to ensure the quality of [the BOC's] performance, *if and when*, the company receives authority to enter the long distance market").

IURC Plan may adopt portions of Ameritech Indiana's proposals cannot supply non-existent statutory authority to order Ameritech Indiana to implement a materially different plan – just as the fact that the consent decree in *United States v. Colorado*, *supra*, included the rest of the parties' agreed provisions did not supply non-existent authority for the district court to alter that decree in other material respects.

II. The IURC Remedy Plan Is Preempted By The Federal Act.

Ameritech Indiana's Petition showed that the IURC Remedy Plan – which is explicitly made "available to CLECs as a *stand-alone* document, *independent of the Section 251/252 interconnection agreement process*," IURC Plan § 2.1 at 6 – circumvents, and is therefore preempted by, the negotiation and other carefully detailed interconnection agreement procedures of § 252 of the Act, adopted by Congress as part of its deliberate choice of a contractual, deregulatory framework for such agreements. The Petition cited controlling Supreme Court authority that State action undermining the *methods* Congress selects to implement a Federal statute is preempted. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992); *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 380 (2000).

The Petition also cited several decisions specifically holding that State commission actions evading § 252's interconnection agreement procedures are preempted. *MCI Telecomm. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1177-78 (D. Or. 1999) (State commission-ordered tariff "conflicts with the Act and is preempted" because, by "dispens[ing] with the interconnection agreement altogether" and "allowing CLECs to order services 'off the rack' without an interconnection agreement," commission had illegally "bypasse[d] the Act entirely and ignore[d] the procedures and standards that Congress has established"); *Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 810 (W.D. Mich. 2000) (State commission, by allowing an entrant to purchase products and services without entering into the process to negotiate and arbitrate an interconnection agreement, "thus evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act"), *aff'd on preemption holding*, 2002 U.S. App. LEXIS 23135 (6th Cir. Nov. 7, 2002); *Wisconsin Bell, Inc. v. Bie*, No. 01-C-0690-C (W.D. Wis. Sept. 27, 2002) (applying same principles in vacating comparable order of Wisconsin commission).[8]

In their Response, the Indiana CLECs simply ignore this authority. Aside from citing a few cases reciting generic preemption principles – none of which contradicts or undermines the specific, directly pertinent law detailed in the Petition – their "preemption defense" is that the Commission supposedly derived the authority exercised in the Order from *State law* that is supposedly preserved from preemption under § 261 of the Act. This assertion is wrong on its own terms. As demonstrated in the Petition, Indiana law – which the Response also ignores – in fact confers no authority on the Commission to award damages (prospectively or otherwise), much less to impose civil penalties.

Furthermore, § 261 of the Act shows on its face that it protects State requirements from preemption *only* if those requirements "*are not inconsistent*" with Federal requirements. The multiple decisions discussed in the Petition and re-summarized above, invalidating State

[8]The Sixth Circuit's affirmance in *Verizon North* was issued the day after the filing of Ameritech Indiana's Petition for Reconsideration.

commission actions that evade § 252 interconnection agreement procedures, show that the IURC Remedy Plan requirements here are indeed "inconsistent" with and therefore preempted by the Federal Act. Moreover, in those cases, unlike this one, the authority exercised by the State commission (such as tariff authority) unquestionably *was* conferred by State statute. Yet the exercise of that State statutory authority in a way that circumvented the Federal Act's interconnection agreement procedures was unquestionably preempted.

Finally, the Indiana CLECs' sudden resort to "State law" as the supposed protection from preemption is simply astonishing, since the central theme of their Response is that the Commission's authority to compel the IURC Plan supposedly does *not* derive from State law, but rather from § 271 of the Act.

In sum, the Order here is fatally flawed under preemptive Federal law. As shown in the Petition, this is a further and independent reason the Commission should now grant reconsideration and vacate the Order.

CONCLUSION

Nothing in the Indiana CLECs' Response refutes the law detailed in Ameritech Indiana's Petition for Reconsideration. The Order adopting the IURC Remedy Plan exceeds the Commission's statutory authority. It also circumvents the interconnection agreement procedure established by the preemptive Federal Act. If the Order is not vacated, these serious legal flaws will need to be addressed in judicial review proceedings that will entail substantial time and expense for the Commission as well as Ameritech Indiana.

Ameritech Indiana therefore again respectfully urges the Commission to vacate the Order, and adopt instead either the Original Ameritech Plan or the Ameritech Compromise Plan.

Respectfully submitted,

Bonnie K. Simmons [# 12067-49]
AMERITECH INDIANA
240 North Meridian Street, Room 1831
Indianapolis, Indiana 46204
Telephone: (317) 265-3676

Peter J. Rusthoven [# 6247-98]
Teresa E. Morton [# 14044-49]
BARNES & THORNBURG
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313

Counsel for Indiana Bell Telephone
Company, Incorporated

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2002 I caused a true and correct copy of the foregoing Reply in Support of Ameritech Indiana's Petition for Reconsideration to be served to Ameritech271@urc.state.in.us.

Peter J. Rusthoven [# 6247-98]

INDS01 PJR 549768v1